

Issue: Group II Written Notice with Suspension (workplace violence); Hearing Date: 05/31/18; Decision Issued: 06/04/18; Agency: DSS; AHO: Carl Wilson Schmidt, Esq.; Case No. 11197; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11197

Hearing Date: May 31, 2018
Decision Issued: June 4, 2018

PROCEDURAL HISTORY

On January 9, 2018, Grievant was issued a Group II Written Notice of disciplinary action with a ten workday suspension for workplace violence.

Grievant filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On April 23, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On May 31, 2018, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?

4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. Grievance Procedure Manual (“GPM”) § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Social Services employs Grievant as an Administrative Staff Specialist. at one of its locations. No evidence or prior active disciplinary action was introduced during the hearing.

On December 12, 2017, Grievant’s Unit was in the process of moving employees among office cubicles. This process including moving telephones, computers, and personal items in desk drawers. Ms. R reported to Grievant. When Ms. R began working at her assigned cubical, items remained in the cubical from the employee who previously worked in that cubical. Ms. R was ready to move her personal belongings but was not sure what to do with the other employee’s belongings. Ms. R approached Grievant to discuss her concern.

Ms. R walked to Grievant’s location in the office. They stood as they talked. Ms. R began explaining her concern. Grievant used a harsh tone to say Ms. R should have told her about the items before then. Ms. R said she was only doing what the Supervisor had told her to do. Ms. R turned to her left and began to walk away as she told Grievant that Grievant did not need to speak to Ms. R “that way.” Grievant reached out her left arm and grabbed the inside Ms. R’s right arm above the elbow. Grievant pulled Ms. R towards Grievant with sufficient force to stop Ms. R from walking forward and causing Ms. R to step backwards towards Grievant. Grievant moved her hand to grasp the front of Ms. R’s forearm to prevent Ms. R from walking away.

The Supervisor was standing approximately 20 to 30 feet away from Grievant and observed Grievant’s actions. The Supervisor yelled, “[Grievant’s first name] let go!” Grievant released her grasp of Ms. R.

Ms. R returned to her cubical. She was upset because of Grievant's actions. Later that evening, Ms. R felt soreness from Grievant's grip but did not notice any bruising of her arm.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action."¹ Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

DHRM Policy 1.80 defines workplace violence as:

Any physical assault, threatening behavior or verbal abuse occurring in the workplace by employees or third parties. It includes, but is not limited to, beating, stabbing, suicide, shooting, rape, attempted suicide, psychological trauma such as threats, obscene phone calls, an intimidating presence, and harassment of any nature such as stalking, shouting or swearing.

Prohibited actions under DHRM Policy 1.80 include:

Prohibited conduct includes, but is not limited to:

- injuring another person physically;
- engaging in behavior that creates a reasonable fear of injury to another person;
- engaging in behavior that subjects another individual to extreme emotional distress;
- possessing, brandishing, or using a weapon that is not required by the individual's position while on state premises or engaged in state business;
- intentionally damaging property;
- threatening to injure an individual or to damage property;
- committing injurious acts motivated by, or related to, domestic violence or sexual harassment; and

¹ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

- retaliating against any employee who, in good faith, reports a violation of this policy.

Employees violating DHRM Policy 1.80 will be subject to disciplinary action under Policy 1.60, *Standards of Conduct*, up to and including termination, based on the situation.

On December 12, 2017, Grievant spoke in a harsh tone to Ms. R. When she responded by turning away from Grievant, Grievant grabbed her arm and pulled Ms. R backwards with sufficient force to stop Ms. R's forward advance and cause Ms. R to step backwards. Grievant held Ms. R's arm until the Supervisor instructed Grievant to release Ms. R. Grievant's physically assaulted Ms. R thereby violating DHRM Policy 1.80 which prohibits workplace violence. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to ten workdays. Accordingly, Grievant's ten workday suspension is upheld.

Grievant argued that she displayed a calming touch and spoke words of affirmation as she apologized to Ms. R for her comments. The evidence, however, is overwhelming that Grievant aggressively grabbed and jerked Ms. R. Her actions were a physical assault of Ms. R

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Human Resource Management"² Under the *Rules for Conducting Grievance Hearings*, "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with a ten workday suspension is **upheld**.

APPEAL RIGHTS

² Va. Code § 2.2-3005.

You may request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.^[1]

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

^[1] Agencies must request and receive prior approval from EEDR before filing a notice of appeal.